

WEBINAR WEDNESDAYS



Wednesday, August 4, 2021

CLOSING ARGUMENT PREPARATION & DELIVERY

Presented by:

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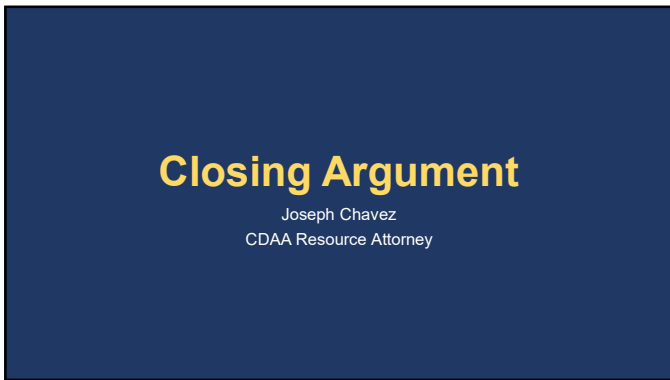
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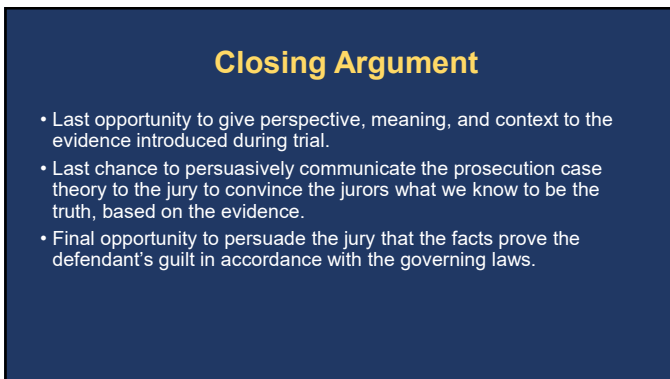
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Closing Argument

- Closing argument should be a fitting culmination to the continuum that began during voir dire.
- The essence of effective closing arguments is argumentation.
- Persuasive closing arguments **connect the dots, make logical inferences from the evidence, and draw conclusions** as to why the prosecution's case theory should prevail.
- It is not time to tediously summarize the witnesses' testimony. The jurors already know in a general sense what happened.

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Closing Argument

- Arguing, explaining, and clarifying the facts and the law is the most important part of a closing argument.
- **Closing argument is the time to give meaning to the evidence.**
- Its what makes closing different from everything that comes before it.

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Closing Argument

- The most effective closing arguments appeal to the juror's sense of fairness and justice and show that a guilty verdict is consistent with those higher goals.
- A prosecutor's closing argument requires both skillful advocacy and an acute awareness of the pitfalls that can create reversible error.

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Training Goals

1. Understand how to persuasively present the facts and law (Case Theory) to convince a unanimous jury.
2. Issue spot the legal and ethical boundaries of closing argument.

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Preparation

- Closing argument preparation should be an ongoing process.
- Should begin thinking about their closing argument, in broad terms, well before the trial begins, in conjunction with developing a **case theory** and **selecting a theme**.
- Thinking about the closing argument is a natural outgrowth of developing a case theory and selecting a theme for the case.
- Should know prior to trial what the **defense's closing arguments** are going to be, as well as the responses to those arguments.

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Preparation

- As the case proceeds closer to trial, the prosecutor should develop a tentative closing argument, which will assist in planning other parts of the trial.
- Relevant **jury instructions** are a helpful roadmap in developing the tentative closing argument.
- The final closing argument preparation should involve **careful planning, ongoing notetaking, pre-delivery outlining, audience analysis, and practice**.
- Must be fully prepared to present closing argument once the last witness has testified.

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Preparation

- Not advisable to write out the planned closing argument, then practice delivering it bec. written language is more formal and uses more complex sentence structure.
- Better approach: outline the closing argument, then practice giving it, **using the words and phrases you naturally use when talking with others on a subject that you feel strongly about.**
- Practicing aloud will forecast how the closing argument is likely to sound.
- Record and listen to your closing argument rehearsals.
- Significant other, co-worker, or friend.

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Preparation

- Words matter and practicing the argument will allow you to evaluate the impact of word choices.
- By verbalizing tough areas that could lead to error, the prosecutor ensures a word selection which results from **analysis, reason, and persuasion as opposed to chance.**
- The best and most effective closing arguments require much thought and preparation.

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Structure & Content

- Closing Argument should have a logical and persuasive structure.
- Effectively pull together the evidence presented, while separating the meaningful from the trivial.
- **Challenge is to give a cogent argument and at the same time cover the relevant facts.**
- An organizational guideline & approach.

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Closing Argument Organization

1. Attention Step.
2. Legal Theory and Legally Sufficient Facts.
3. Key Issue Statement.
4. Argument.
5. Rebuttal.
6. Exit line.

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Closing Argument Components

1. Attention Step:
 - Engages the jury's attention immediately.
 - Often alludes to the prosecution theme or re-creates the key event from the prosecution's perspective.
 - Should be carefully planned and practiced, not only due to **primacy & recency** but also bec a well-prepared attention step projects **sincerity** and **confidence**.

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Closing Argument Components

1. Attention Step:
 - Purpose: capture the juror's attention in a way that will resonate with them during deliberations.
 - Example DV Case: *"This is a case about a man beating his wife. This is a case about a man punching his wife ... punching her so hard that she lost consciousness and gained six stiches."*
 - Incorporates the theme and focuses on defendant's conduct.

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Attention Step

- Don't reintroduce yourself or thank jury.
 - Wastes time
 - Alienates some jurors
 - Misses your golden opportunity
- Start with a memorized introduction that hammers your theme and strongest facts.
 - Sums up case
 - Catches juror's attention

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Attention Step

- Consider quoting the defendant.
- Consider incorporating your theme:
 - "This is a case about a man who would not take no for an answer."
 - "This is a case about a violation of trust – the most fundamental trust – the trust a child should be able to have in her family."

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Closing Argument Components

2. Legal Theory & Legally Sufficient Facts :
- Discussion of the prosecution's **legal theory** and **covers the elements of the charged offenses**, along with the **evidence that proves each element**.
 - Discussion should be enhanced with **visual aids**.
 - As each element is explained, apply the legally sufficient facts.
 - Frequently, only one element is contested and it is reserved for the key issue statement for fuller argument.

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Closing Argument Components

2. Legal Theory & Legally Sufficient Facts :
- Discuss the elements of the crime(s) with **visual aids**.
 - According to educational psychologists, people remember far more of what they see than what they hear.
 - **Research shows that the average person retains 50 percent more information when multimedia was used as the delivery tool.**
 - After 72 hours, people remember 10% of information they've heard orally. When presented both orally & visually retention increased to 65 to 85 %

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Closing Argument Components

2. Legal Theory & Legally Sufficient Facts :
- Discuss the elements of the crime(s) with **visual aids**.
 - **The charts/visual aids become your notes.**
 - Bullet jury instructions: use only the relevant language from the instructions.
 - It is not necessary to use all of the language from the jury instructions as long as you are not misleading the jurors.

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PC 273.5 - CALCRIM 840

Elements

1. Willfully inflicted a physical injury on his spouse.
2. The injury inflicted by the defendant resulted in a traumatic condition.

Evidence

- Elizabeth Bennet's 911 call.
- Elizabeth Bennet's spontaneous statement to officers.
- Cameron Frye's observations.
- Certified marriage certificate.
- CSI photograph.
- EMT Silva's observations.
- ER Doctor William Green.

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CT. 1: DRIVING UNDER THE INFLUENCE

1. **DRIVING**
 - Defendant was behind the wheel when stopped
2. **UNDER THE INFLUENCE**
 - Driving Pattern
 - Odor of Alcohol
 - Bloodshot & Watery Eyes
 - Slurred Speech
 - Field Sobriety Tests
 - PAS
 - Officer's Expert Opinion
 - EPAS

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Closing Argument Components

2. Legal Theory & Legally Sufficient Facts :
 - May also include a brief motivational segment explaining that the law against the crime is designed to protect personal safety, life or property.

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Closing Argument Components

3. Key Issue Statement:
 - **Succinctly stating** and **highlighting** any disputed element that has been reserved during the legal theory segment.
 - **This portion of the closing argument narrows the focus for argument on the main disputed issues in the trial.**
 - Example:
 - "The single issue in this case is: did the defendant commit the crime?"
 - Often: self defense, ID, consent, lack of specific intent.

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Closing Argument Components

4. Argument:

- The body of the closing.
- Primary purpose during this segment is to review of key evidence & resolve the contested issues in the prosecution's favor.
- The detail ought to highlight the overall strength of the prosecution's evidence & show that the prosecution's witnesses had **consistent facts** and **were credible**.

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Closing Argument Components

4. Argument:

- Review and analysis of the evidence should not be tediously discussed witness-by-witness.
- Going over all of the prosecution's witnesses' testimony in great detail again is a waste of time.
- Instead, **the argument should explain what the evidence means and how it proves the prosecution's case theory and disproves the defense case theory.**

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Closing Argument Components

4. Argument:

- The evidence to be argued should be listed under each of the pertinent issues.
- An issue-by-issue summary is sometimes referred to as **"marshalling the evidence."**

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Closing Argument Components

4. Argument:

- In outline form, a contested issue argument may look like this:
 - Statement of issue
 - Summary of relevant evidence
 - Discussion/Argument
 - Statement of next issue
 - Summary of evidence relevant to that issue
 - Discussion/Argument, etc

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Closing Argument Components

4. Argument:

- Only the essential facts need to be analyzed as each statement of the issue is developed by evidence or facts.
- Deductive & inductive reasoning piles up the **evidence and reasonable inferences** supporting the prosecution case theory on the key issues.
- Appealing to the jurors' **common sense and life experiences** when arguing inferences is often an effective approach.
- Use an **array of media & physical evidence** to assist in persuasiveness.

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Closing Argument Components

4. Argument:

- Referring back to your opening statement is effective bec. it illustrates continuity and coherency in your presentation & now that all of the evidence is in, the jury will understand your opening statement in a more meaningful way.
- For example: *"I told you during opening statement that this would be a case about choices. Now you know that the defendant is responsible for what happened because of his choices..."*
- This statement creates a springboard for you to review those choices and argue why those choices mean that the defendant is guilty.

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Closing Argument Components

4. Argument: order

- Communication and social psychology research indicate going from strong to weak is the most persuasive pattern for argument.
- If you wait to put your strongest argument last, you may be facing a skeptical jury that has already been asked to accept weaker positions.
- Coupled with the rules of primacy and recency suggest that prosecutors should argue their strongest issue first, the next strongest issue last, and remaining issues in between them.

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Closing Argument Components

4. Argument:

- Use an array of media to assist in persuasiveness but remember that **YOU are the Messenger**.
- Using "**Fact visuals**" is an effective way to demonstrate that the prosecution has all the facts necessary to prove the defendant is guilty.
- Depending on the nature of the case, the prosecutor may want to list important facts by **witnesses, counts, incidents** or **locations**.

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Diagrams/Charts

DEFENDANT'S CHARGES				
Count	Charge	Date	Victim	Special Allegation
1	Robbery	1/17/19	Mary Wilson	
2	Robbery	3/20/19	Dorothy Greene	Used DW
3	Carjack	4/12/19	Sandy Kenwood	Used Firearm
4	Robbery	4/12/19	Sandy Kenwood	
5	ADW	5/9/19	Robert Allen	Used Firearm
6	Robbery	5/15/19	Suzan Thurman	Used DW
7	Rape	5/15/19	Suzan Thurman	Used DW
8	Attempted Murder	5/22/19	Tony Medina	Used Firearm

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Diagrams/Charts

CHARGES AGAINST DEFENDANTS BY LOCATIONS					
Location	Charges	Dates	Counts	Victims	Defendants
123 Maple St.	Robbery	11/11/19	5	J. Smith	Fields & Gray
	Burglary	11/11/19	2	R. Wilson	Fields
678 Birch St.	Kidnap	11/11/19	3	B. Green	Fields & Gray
	Murder	11/11/19	1	F. Reed	Gray
	Rape	11/11/19	4	M. Williams	Fields & Gray
345 Elm St.	Grand Theft	11/11/19	6	T. Glenn	Fields
	Possession for Sale	11/11/19	7		Fields
	Sales: Cocaine	11/11/19	8		Gray

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Closing Argument Components

4. Argument:

- Witness testimony can be bolstered by highlighting relevant witness credibility factors from the jury instructions.
- For example, *Carmen Amato testified that she had ample opportunity to observe the defendant and got a good look at him. She has no bias or personal interest against him. She also made several consistent statements to investigating officers and medical personnel about what happened.*

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Closing Argument Components

4. Argument:

- **Preemption:** Address weaknesses in the case before the defense has an opportunity to bring them up in their argument.
- Addressing problematic evidence proactively will convey to the jury that you are aware of the issue and that the defendant is still guilty.
- Diffuses the defense argument's impact regarding the same evidence because the prosecutor has already **framed the issue**.

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Closing Argument Components

4. Argument:

- One approach to address problematic evidence is to turn the weakness into a strength.
- For instance, if the victim is unsympathetic or unlikeable, consider the argument that the **defendant chose the victim strategically and counted on the fact that no one would believe the victim or care about what the defendant did.**

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Closing Argument Components

4. Argument:

- If the problematic evidence cannot be turned into a strength, the best time to discuss it is after the jury has heard your arguments supporting a guilty verdict.
- This approach is recommended because research shows when contradictory information is presented in a single communication, there is a tendency for the first items presented to dominate the total impression.

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Closing Argument Components

5. Rebuttal (address the defense):

- This portion anticipates, articulates, analyzes, and where possible, annihilates the defense case theory.
- Addresses the defense without giving the defense arguments credence by overemphasis:
 - *"This is not a case of consent. This is a case about being cornered and caught off guard. About the Defendant physically overpowering Kristen Sawyer when she had no reason to be on guard, when she least expected it, and when she could not fight back."*

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Closing Argument Components

5. Rebuttal (address the defense):

- After reminding the jury of the prosecution's theme, the prosecutor should systematically point out the deficiencies in the defense's arguments.
- **"Two-sided"** arguments that present and then refute a counterargument can be very persuasive, especially when the audience is familiar with both sides of the issue.
- **"Two-sided"** arguments, when well analyzed and delivered builds the prosecutor's credibility because their use conveys candor, fairness, intelligence, and the **ability to analyze both sides**.

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Diagrams/Charts

COMPARISON	
THE DEFENDANT'S STORY	THE PEOPLE'S FACTS
Defendant claims he never got the money.	Defendant's bank account shows he received \$89,000 from the victim.
Defendant claims he worked for the money.	Defendant has no proof he ever worked for the victim.
Defendant claims he was investing for the victim.	Defendant spent the \$89,000 for a boat and 2001 Navigator SUV.
Defendant claims it was a banking error.	Why didn't the defendant notify the bank or victim?
Defendant claims the money was a loan.	Why wasn't there some document showing this claim?
Defendant claims the money was an illegal gambling debt.	Victim is a 73-year-old woman who doesn't gamble.

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Diagrams/Charts

INTERPRETATION OF FACTS		
ACTION	REASONABLE	UNREASONABLE
Defendant asks U/C officer what he wanted to buy.	Defendant was trying to sell drugs.	Defendant was being friendly.
Defendant takes \$20 from the U/C officer.	Defendant was signaling to the holder to bring the drugs.	Defendant was waving at passing cars.
Defendant waves to car across the street.	Defendant was accepting payment for drugs.	Defendant was holding money for the U/C officer because he was afraid of being robbed.
The person across the street hands something to defendant.	Holder was giving the drugs to defendant.	Another person was giving the defendant some cigarettes.
Defendant hands something to the U/C officer.	Defendant was completing the sale.	Defendant did not know he was handing the U/C officer an illegal drug.

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Closing Argument Components

5. Rebuttal (address the defense):

- Tactically most powerful rebuttal arguments can be saved for the separate rebuttal argument.

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Closing Argument Components

6. Exit Line:

- Memorized & practiced and powerful ending during approximately the last minute.
- Deliver an unequivocal and memorable exit line to conclude the closing argument.
- It should tell the jurors what you want them to do through their verdict with passion and conviction.
- This exit line can be more subdued than the Rebuttal Argument Exit Line.

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Closing Argument Components

6. Exit Line:

- Consider:
 - "The evidence is clear, straight-forward, and overwhelming."
 - "The evidence all fits together and adds up to only one reasonable conclusion."
- Now that you've heard all of the evidence, there is only one person who could have committed this crime, ... and he is sitting right there."
- There is only one reasonable explanation for all of the evidence that we've heard, and that is the defendant... is Guilty."

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Closing Argument Components

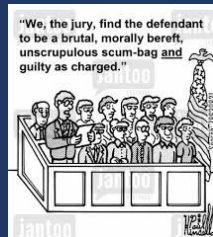
6. Exit Line:

- Consider:
- "Ladies and gentlemen, the evidence in this case is overwhelming. It is compelling. And it compels you to return the only reasonable verdict in this case: GUILTY"
- "The evidence in this case is compelling. It compels you to the only reasonable verdicts in this case. Verdicts of guilty on all counts."

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Don't End With A Whimper!

- Strong definitive exit line.
- Tell them why they need to convict the defendant.
- Leave them wanting to convict the defendant.



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Persuasiveness

- Persuasive advocacy is an art, with scientific underpinning, requiring the prosecutor to decide which words, tone, and arguments to emphasize in order to convey the truth of the People's/State's case.
- The delivery of the closing argument is at least as important as its content.
- The jurors will be looking for any verbal and nonverbal cues that suggest you are anything less than totally sincere.

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Persuasiveness

- Use controlled and deliberate breathing to slow down your adrenaline, take the edge off anxiety, and make sure that you have enough air to speak confidently.
- Establish direct eye contact with the jurors during closing argument.
- Effective eye contact usually enhances sincerity and allows for feedback.
- Avoid the temptation to look too much at the jurors who are giving positive feedback. Instead, establish eye contact with the other jurors to attempt to convince the rest.

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Persuasiveness

- To ensure maximum eye contact, prosecutors should not read from notes.
- The only things read to the jury should be relevant portions of jury instructions, brief quotations, or brief testimony passages.
- For persuasive effect, it is fine to read short testimony passages to impress upon the jury crucial wording upon which the case may turn.
- If reading a transcript of more than three sentences, make copies so each juror can read along.

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Persuasiveness

- Persuasive closing arguments require more energy than casual conversation. Energy and speed, however, are not synonymous.
- When prosecutors argue persuasively, they use lots of energy – for emphasis and clarity, not speed.
- When prosecutors speak persuasively, they often become more energetic while simultaneously slowing their pace.
- The increase in energy signals the importance of what is being said, and the slower pace gives the jurors time to think about, and be persuaded by, what is being said.

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Persuasiveness

- Variation is the heart of engaging people's attention.
- If you say everything at the same pace, then it all sounds the same and appears to be of equal importance.
- Practice saying important sentences at a slower pace to provide contrast.
- Important phrases and sentences should be spoken at a slower, more deliberate pace, to mark their significance.

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Persuasiveness

- Silent pauses can be particularly useful before or after making main points.
- On key points, stop and let the jury think about the point you have just made.
- Let the argument sink in.
- If jurors don't have time to think about what you are saying, they won't remember it, much less be persuaded by it.

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Persuasiveness

- Your voice can be lowered or raised for effectiveness when making important points.
- Lowering your voice is a helpful approach to gaining the jury's attention.
- Raising your voice will emphasize a point.

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Persuasiveness

- Teaching and arguing are closely related activities.
- You want to teach the jury your arguments so some of them can repeat what you have said during their deliberations, to persuade their fellow jurors.
- The goal is to teach the jurors most inclined to your perspective to be your advocates during deliberations.

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Persuasiveness

- Some movement is necessary to keep the argument interesting.
- Do not be physically locked in one spot unless the court requires you to remain behind a lectern. Even then, stand off to the side of the lectern so the jurors can see your whole body.
- This will prevent the lectern from becoming a physical and psychological barrier between the jury and you.
- Move with purpose as opposed to nervously pacing back and forth. **A purposeful move is motivated by and connected to your words and ideas.**

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Persuasiveness

- Use descriptive and vivid language in order to appeal to the jury's perceptions and keep their attention.
- **Vivid language causes people to think in mental pictures and evoke feelings.** Word choice has much to do with persuasion.
- Note the difference between, "*Mary Newton received two cracked ribs due to blunt force trauma*" vs. "*Mary Newton suffered two cracked ribs as a result of the beating the defendant inflicted upon her.*"
- The second version captures attention and evokes sensory images.

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Persuasiveness

- Rhetorical questions:
- Juror's can not avoid mentally attempting to answer.
- Attempting to answer the question, requires jurors to recall evidence & make logical inferences, just as they will in deliberations.
- A well-framed rhetorical questions allows you to "clear a path" between the evidence & logical inferences of guilt.

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Persuasiveness

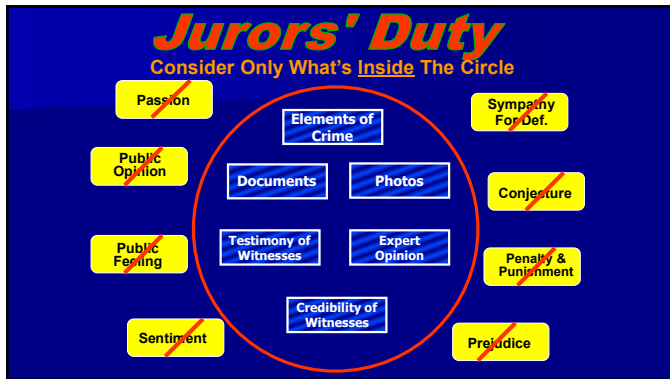
- Rhetorical questions: example
- ...and then the defendant, having been caught red handed as he swerved down the freeway after drinking a six-pack of beer, was offered a test for blood alcohol...a test that he has no lawful right to refuse – a test that would conclusively prove his innocence or guilt...ladies and gentlemen, why did he refuse to take the test...because he already knew the answer the test would provide; he just didn't want us to know.

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Persuasiveness

- When you visually show something to someone at the same time you orally explain it, that person is twice as likely to remember what you said.
- The most effective way to communicate with the jury during closing argument is through the use of visual aids.
- Powerful exhibits: make sure that you do not inadvertently lessen impact through overuse.

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DOUBT?

- **Relates to an element of the charged offense**
- **Based on the evidence, not speculation or any other improper source**
- **Reasonable**

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Persuasiveness

- Effective closing arguments need to reach the jurors' hearts as well as their minds.
- Adjust your **tone** appropriately based on the facts of the case.
- Prosecutors should always set an **emotional tone which fits the facts of the case**.
- Save your indignation for egregious and violent crimes and be business-like while prosecuting financial crimes.
- If the case calls for a sympathetic tone, use one.
- If your sense of values is offended and those of the jurors should be, impart this with your tone.

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Common Closing Issues

- Avoid saying "I"
- It is improper to make personal statements of belief concerning witness credibility or the defendant's guilt.
- Arguments should be grounded in the evidence and law.
- Avoid legal-eze: "I submit..."; not persuasive.
- Far more persuasive to simply make declaratory statements such as, "The Defendant is guilty of these crimes" or "The evidence overwhelmingly establishes that Defendant Smith is guilty of this crime."

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Common Closing Issues

- Dueling stories about what happened - Strategy:
 - Highlight your witness's/victim's account.
 - Outline how the account is **corroborated** by evidence or other witnesses.
- Attack the defendant's version of facts
 - Has there been a change in story? (arrest and trial, or between direct and cross, or between opening and closing)?
 - Are the allegations made by the defendant in conflict with evidence?

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What is Reasonable?

• Bennet/Officers/Frye:

- "Fix my dinner bitch"
- Retreated to her room to get away
- Loud slap
- Slapped so hard across the face it left a handprint indentation
- D following behind saying "sorry"
- Scared for her life and ran to try and call 911
- Phone ripped out of wall
- "He hit me, he always does this when he's mad."
- Bennet so physically and emotionally distraught that it took her three minutes to calm down just to be able to speak
- "I'll get you bitch when I get out"

• Defendant:

- She was yelling at me from the moment she walked in the door.
- "I was trying to get her to make dinner and she was giving me attitude."
- I followed her into the bedroom
- Slapped me on shoulder or chest
- I said I was sorry
- I "unplugged" the phone
- Bennet hit herself
- Bennet lied
- Cop lied about me threatening her

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Common Closing Issues

- Recanting victim
 - Focus on how the fact that the victim recanted helps your case.
 - Defendant is in control.
 - Defendant's lies & manipulation worked on victim.
 - Emphasize the night of the crime.
 - Explain why the jury should care (by discussing evidence of THIS CASE to avoid misconduct).

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Common Closing Issues

- High Risk Victim
 - Drug users, Sex workers, Transient/Homeless people, etc.
 - Victims that make horrible mistakes before/during crime.
 - **Everyone is entitled to the protections of the law.**
 - Focus on the predator, not the prey (**Defendant's conduct**).
 - The defendant picked the victim based on the victim's vulnerability.

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Common Closing Issues

- Inconsistencies with Witness Testimony
 - Cal Jury instruction: **Do not automatically reject** conflicting testimony; consider whether the differences are important.
 - Ariz Jury instruction: reasonableness of the witness's testimony when considered in the light of the other evidence.

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Common Closing Issues

- Inconsistencies with Witness Testimony:
- Common sense analysis -
 - People make mistakes; see & recall things differently.
 - Consider the witness' / victim's focus/perceptions at the time of the observation.
 - Remind jurors to think about their own experiences (alcohol).
- Use other **independent** evidence to corroborate truth.
- Corroboration chart.

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Common Closing Issues

- Defense witness/defendant lies:
 - Lies are important because of the truth that this being concealed.
- Lies can be powerful evidence of:
 - Bias.
 - Control/domination.
 - Guilt!

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Rebuttal Closing Argument

- One role in rebuttal argument is to persuade the jury of the defendant's guilt by exposing the defense's weaknesses.
- Do not fall into the trap of simply responding to every question raised by the defense.
- This is the time to show that the defense does not withstand the **"reasonable test."**

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Rebuttal Closing Argument

- Rebuttal should not be extemporaneous.
- Since prosecutors should be able to anticipate and analyze the defense arguments prior to trial, the rebuttal argument should be strategically planned and executed.

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Rebuttal Closing Argument Components

1. Attention Step
2. Rebuttal Argument
3. Exit Line

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Rebuttal Closing Argument Components

1. Attention Step:
 - Prepared and impactful one or two sentences, transition into rebuttal argument.
 - Anticipating defense argument allows you to plan the rebuttal Attention Step, and other parts of your rebuttal well in advance of hearing the defense's closing argument.

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Rebuttal Closing Argument Components

2. Rebuttal Argument:

- Prepared & ready responses to anticipated defense arguments, particularly **stock arguments** like "there is a lack of evidence," should be crafted in advance.
- Argue the evidence & law attacking the underpinnings of the defense legal & factual theories.

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Rebuttal Closing Argument Components

2. Rebuttal Argument:

- Correct defense misstatements of law & fact.
- You can give your most powerful arguments; they will go **unanswered by the defense**.
- Don't spend the entire time addressing **only** the points raised by the defense and not reminding the jury of your Case Theory; especially if the defense takes a "shot gun" approach.

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Rebuttal Closing Argument Components

2. Rebuttal Argument: Visuals

- Generally, compare the strength of the prosecution's case against the relative weakness of the defense case.
- The goal is to allow the jury to see the merits of the prosecution's case alongside of the defense's claims.
- Using standard rebuttal argument visuals will allow you to organize your rebuttal logically and into distinct parts.

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Rebuttal Closing Argument Components

2. Rebuttal Argument: Visuals

- Standard rebuttal argument visuals are categorized as:
 - Facts and Corroboration
 - Element and Evidence
 - Crimes and Evidence
 - Reasonable and Unreasonable
 - Defendant's Claim (or story) vs. People's/State's Evidence

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Rebuttal Closing Argument Components

2. Rebuttal Argument: Visuals

- Rebuttal argument also lends itself to visuals that address **credibility issues**, since the defense often attacks prosecution witnesses' credibility.
- A credibility visual categorized as **Testimony & Corroboration** can assist the prosecutor in rehabilitating their witnesses and highlight the lack of veracity in the defense case.

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Rebuttal Closing Argument Components

3. Exit Line:

- The final minute or less. Need for a strong ending requires memorization & practice.
- Can be a **motivational call-to-justice statement**.
- What the defendant did was motivated by one thing: jealousy. He decided to kill Tara Alfaro for leaving him. He decided that if he couldn't have her no one could have her. He planned how he would do it and carried it out just as he planned it. Now it's time for you, the jury, to find the defendant guilty of premeditated murder. The facts demand it, and justice demands it.*

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Rebuttal Argument

- NO SANDBAGGING!!!
 - Ethical considerations.
 - You don't need to.
- But, you can save some things that you know defense will cover in their closing for rebuttal.
 - Be prepared.
 - Keep it clear, concise, and avoid rambling.

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Legal and Ethical Restraints

- A complete understanding of the legal & ethical limitations of closing argument will likely make closing argument the most professionally rewarding part of the jury trial.
- With a firm grasp of permissible argument, you will be able to deliver a persuasive closing argument that reaches the juror's hearts & minds, while upholding the def's rights.

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Special Rules for Prosecutors

- "... prosecuting attorneys are government officials and are clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. **It is their duty to see to it that those accused of crime are afforded a fair trial....**The prosecutor may prosecute with earnestness and vigor...but, **while he may strike hard blows, he is not at liberty to strike foul ones.**"
Berger v. United States (1935) 295 U.S. 78, 88.

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Legal and Ethical Restraints

- Legal Principles
- Commenting on defendant's silence
- Burden shifting
- Misstatement of facts
- Commenting on evidence not presented
- Vouching
- Viewing the crime through the eyes of the victim
- Improper attacks on defendant
- Improper attacks on defense attorney

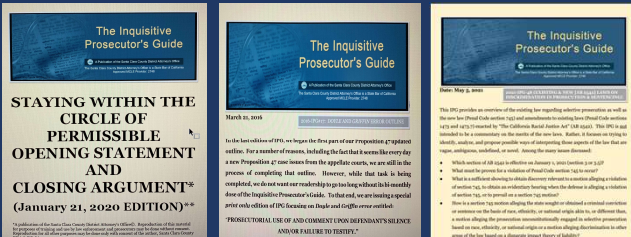
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Legal and Ethical Restraints



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Legal and Ethical Restraints



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Presumption of Innocence

- Bedrock legal principles.
- Must accurately state when the Presumption of Innocence comes to an end.
- The presumption of innocence remains until by the return of the verdict the defendant is found guilty, and it was error to instruct that it continues "until such time in the progress of the case as you may be satisfied beyond a reasonable doubt." *Bush v. State* (1917) 19 Ariz. 195, 168 P. 508.

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Presumption of Innocence

- Must accurately state when the Presumption of Innocence comes to an end.
- "As the evidence comes in—and the evidence has come in—and when you walk into that jury room and discuss the case—discuss the evidence in this case, once the evidence proved to you beyond a reasonable doubt that [defendant] committed the crime, there's no presumption of innocence. It's—it goes away as the evidence comes in and the evidence shows you that he's guilty. The presumption of innocence doesn't just stay there forever." *People v. Romo* (2016) 248 Cal.App.4th 682, 690–691

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Reasonable Doubt

- "Prosecutors should avoid drawing comparisons that risk confusing or trivializing the reasonable doubt standard.
- *U.S. v. Velazquez*, 19-50099, 9th Circuit, Published June 23, 2021.
 - We are also troubled by the suggestion that RD can be compared to an "everyday" experience. P.12

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Reasonable Doubt



People v. Katzenberger (2009) 178 Cal.App.4th 1260, 1266-1268.
People v. Centeno (2014) 60 Cal.4th 659, 669-671.

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Reasonable Doubt

- Showing the jury a widely known image, such as a diagram outline of the state of California or a picture of the Statute of Liberty with portions of the image missing and then analogizing the reasonable doubt burden has been met because the image is still recognizable has been found to be error in several cases.
 - Improper quantitative measure for the concept of reasonable doubt.
 - When visual aids are not analogous or related to the facts of the case they are a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt.

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Reasonable Doubt Charts

- Prosecutors should not use charts that appear to quantify the reasonable doubt standard.
- May be able to exclude defense charts that appear to quantify the reasonable doubt standard.
- If not, consider: "the easy thing to do is read from instructions, like I did. But DC didn't do that. He decided to create his own chart. Something from his mind."

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Commenting on Defendant's Failure to Testify at Trial

- Rule: NEVER DO SO!
- Neither the judge nor the prosecutor may suggest to the jury that it can draw the very logical conclusion that a defendant who decides not to testify is probably guilty.
Griffin v. California (1965) 380 U.S. 609, 615.
- Prosecution may not directly, indirectly, or inferentially call attention to the Defendant's failure to testify.

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Griffin case

- "The defendant certainly knows whether [the victim] had this beat up appearance at the time he left her apartment ... these things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. The victim is dead, she can't tell you her side of the story. The defendant won't."
Griffin v. California (1965) 380 U.S. 609.

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Commenting on Uncontradicted or Unexplained Evidence

- *Griffin* "does not extend to the comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses."
- **HOWEVER**, it may be error to argue that certain testimony is uncontradicted if **such contradiction could be provided only by the defendant**;
- Or you know witness is unavailable, (like invoked).

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Griffin Summary

- A prosecutor may call attention to the defense's failure to put on exculpatory evidence, but only if those comments are not aimed at the defendant's failure to testify and are not of such a character that the jury would naturally and necessarily interpret them to be a comment on the failure to testify.

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Doyle Error

- A person's silence in apparent reliance on Miranda advice cannot be used against him in a criminal trial.

Doyle v. Ohio (1976) 426 U.S. 610.

98

Cops Wouldn't Risk their Jobs to Lie?

- Only if the witnesses have testified that they would lose their jobs if they were found to have lied under oath.

People v. Rodriguez (2020) 9 Cal.5th 474, 481-482.

99

Avoiding Personal Opinions

- One way of avoiding claims that a prosecutor has violated the rule against stating personal opinions is to include a caveat at some point in the closing argument, that any opinions expressed are based on the evidence presented.
- Anything I say is only my opinion of what I feel the evidence shows. The evidence shows certain things; from these things you can infer that other things have happened. Throughout the course of my argument, I will be giving you my opinions from what I feel the evidence shows.

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Legal and Ethical Restraints

- The California Racial Justice Act of 2020 added Penal Code section 745.
- 745 (a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.
- Defendant's burden: Preponderance of the Evidence standard.

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Legal and Ethical Restraints

- A violation is established, if:
- racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful.

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Legal and Ethical Restraints

- Racially discriminatory language defined:
- language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, **racially charged or racially coded** language, language that compares the defendant to an **animal**, or language that references the defendant's physical appearance, culture, ethnicity, or national origin.
- Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

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CDAА Resources

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